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Watson and Ramey: The Balance of Interests in Non-Exigent Felony Arrests

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Comments

WATSON AND *RAMEY*: THE BALANCE OF INTERESTS IN NON-EXIGENT FELONY ARRESTS*

> Without privacy, the soul of man withers. It is like the air that we breathe; invisible, yet sustaining so long as it is there.[1]

INTRODUCTION

The fourth amendment[2] requires that any intrusion upon personal privacy be reasonable.[3] Balancing the need of law enforcement against the extent of the invasion determines the reasonableness of an intrusion.[4] Reaching this balance between individual

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1. State v. Carluccio, 116 N.J. Super. 49, 54, 280 A.2d 853, 858 (1971).

2. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizure shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

3. Wyman v. James, 400 U.S. 309, 316-17 (1971); Ford v. United States, 352 F.2d 927, 931 (D.C. Cir. 1965).

The United States Supreme Court has declared an arrest to be "a seizure of the person" and thus within the reach of the fourth amendment. Terry v. Ohio, 392 U.S. 1, 10 (1968).

4. *See* Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967).

rights and the necessities of criminal investigation in arrest situations presents troublesome problems.[5]

Recently, the United States Supreme Court rendered its opinion in *United States v. Watson*,[6] which dealt with arrests in public places. The California Supreme Court subsequently decided *Ramey v. People*,[7] a case concerning an arrest made in the home. The balance between state and individual interests struck in these cases will have a dramatic effect on law enforcement and on the rights of suspects.

While numerous commentators have addressed individual rights in the context of search law,[8] none have directly considered the privacy rights of the arrestee. The purpose of this Comment is to explore the quality of fourth amendment protection granted an arrestee.

THE *Watson* DECISION

On August 17, 1972, Awad Khoury, a reliable informant,[9] told a United States postal inspector that Watson had been stealing credit cards from the mails. The informant and Watson were to meet later. The inspector asked Khoury to ascertain if Watson had any additional stolen cards. On August 23, the suspect and the informant met in a restaurant. When Watson placed some credit cards on the table, Khoury signaled the inspector, who then arrested Watson. A subsequent consensual search of Watson's car revealed more stolen cards.[10] Watson was convicted for possession of the stolen cards.

Watson appealed his conviction to the Ninth Circuit, contending that the failure of officers to obtain a warrant had vitiated the arrest and subsequent search.[11] The court of appeals invalidated the

5. *See* State v. King, 191 N.W.2d 650, 654 (Iowa 1971).
6. 44 U.S.L.W. 4112 (U.S. Feb. 4, 1976).
7. Crim. No. 18795 (Cal. Sup. Ct., Feb. 25, 1976) (on file with the *San Diego Law Review*).
8. *See, e.g.*, Note, *The Right of the People to be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U.L. REV. 1119 (1967).
9. Khoury had contacted the inspector approximately five to ten times in the past and had relayed information about Watson on prior occasions. That information was found to be correct. *See* United States v. Watson, 504 F.2d 849, 851 (9th Cir. 1974).
10. *Id.*
11. Watson also contended that Khoury was not a sufficiently reliable

arrest.[12] Because seven days had elapsed between the formation of probable cause and the arrest, the court held that the inspector had had sufficient time to obtain a warrant.[13] The absence of an exigency[14] excusing a warrant invalidated the arrest.[15] In reaching this conclusion, the court relied heavily on *Coolidge v. New Hampshire*,[16] suggesting warrants be obtained in all non-exigent arrest situations.[17]

The United States Supreme Court reversed the court of appeals and held that the inspector had complied with 18 U.S.C. § 3061(a), empowering postal employees to make warrantless felony arrests.[18] The Court noted Congress' approval of laws authorizing other fed-

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informant and that his consent to search was neither informed nor voluntary. *Id.* at 852. The court of appeals found that Khoury was a reliable source because he had supplied accurate information in the past. *See* note 9 *supra*. As to the second point, the Ninth Circuit held that knowledge of the right to refuse consent is not necessary to a prima facie showing of voluntariness. However, they concluded that because of the illegality of the arrest, the "totality of circumstances" pointed to the invalidity of the consent. 504 F.2d at 853. Using this same test, the United States Supreme Court found that the consent was voluntary. *See* United States v. Watson, 44 U.S.L.W. 4112, 4114 (U.S. Feb. 4, 1976).

12. 504 F.2d at 852.

13. *Id.*

14. The concept of exigent circumstances has received wide attention in search and seizure law. The requirement of a warrant generally governs all searches and seizures. Elkins v. United States, 364 U.S. 206, 222 (1960). However, the warrant requirement may be disposed of in an emergency. Chimel v. California, 395 U.S. 752, 760-68 (1969); United States v. Jeffers, 342 U.S. 48, 51 (1951); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10 (1948). The standards of exigency are strict indeed. *See* McDonald v. United States, *supra* at 454-55. The word *emergency* connotes exigency.

15. 504 F.2d at 852.

16. 403 U.S. 443 (1971).

17. *Coolidge* construed the Court's commentary in Warden v. Hayden, 387 U.S. 294 (1967), that a grave constitutional question might be occasioned by a forceful, nighttime entry into a dwelling to arrest. *Coolidge* stated that these dicta commanded, by negative implication, that arrest warrants be obtained in non-exigent circumstances. *Coolidge*, however, concerned itself with arrests in the home, not in a public place.

18. 18 U.S.C. § 3061(a) (1948) provides in pertinent part:

> (a) . . . officers and employees of the Postal Service performing duties relating to the inspection of postal matters may . . .
>
> . . . .
>
> (2) make arrests without warrant for offenses against the United States committed in their presence . . .
>
> (3) make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

Congress specifically enacted § 3061 to resolve conflicts among circuits over the legality of warrantless arrests. *Compare* Alexander v. United States, 390 F.2d 101 (5th Cir. 1968), *with* United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968).

eral agencies to arrest without prior judicial review[19] even absent exigent circumstances.[20]

The Court stated that at common law only probable cause was necessary to effect an arrest.[21] Early cases authorized warrantless arrests even when the police had sufficient time to obtain a warrant.[22] The Court found this precedent persuasive.[23] The majority noted the judicial preference for a warrant[24] but concluded:

> [W]e decline to transform this judicial preference into a constitutional rule where the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber the criminal process with endless litigation.[25]

In dissent, Justice Marshall[26] stated the Court had never precisely sanctioned warrantless arrests when there was an opportunity to

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19. 18 U.S.C. § 3053 (1948) authorizes United States marshalls and their deputies to "make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."
An identical grant of power is made to directors and agents of the Secret Service (18 U.S.C. § 3056(1948)) and to the Customs Service and Bureau of Narcotics (Act of July 18, 1956, 26 U.S.C. § 7607).

20. Until 1951, 18 U.S.C. § 3052 allowed the F.B.I. to arrest without a warrant only if there was reasonable ground to believe that the suspect would escape before a warrant could be obtained. The Act of Jan. 10, 1951, c. 1221, § 1, 64 Stat. 1239, withdrew the condition and allowed warrantless arrests in non-emergency situations. *See* United States v. Coplon, 185 F.2d 629, 633-36 (2d Cir. 1950).

21. 44 U.S.L.W. at 4114.

22. *Id.*

23. *Id.* at 4115-16.

24. *Id.* at 4116.

25. *Id.* In its brief, the government stated that the issues concerning warrantless arrest in *Watson* could be reduced to one question: Does arrest without a warrant under circumstances in which obtaining a warrant is feasible violate the fourth amendment if the arrest takes place in public? Petitioner's Brief for Certiorari at 7, United States v. Watson, 44 U.S.L.W. 4112 (U.S. Feb. 4, 1976). During argument before the Supreme Court, counsel for both the government and Mr. Watson were asked to cite cases establishing a warrant requirement for arrests. Solicitor General Andrew Fry replied that no decision had held that such a duty to obtain prior judicial approval exists. Michael Nasitir, the defendant's attorney, responded by citing cases involving searches, asserting that the same protections afforded this latter category of intrusions should be utilized in arrest law. Justice Stewart replied that the Court has assumed the validity of warrantless arrests. 18 CRIM. L. RPTR. 4027, 4028 (1975).

26. Justice Marshall contended that the Court unnecessarily concerned

obtain prior judicial approval.[27] He criticized the Court's deference to the judgment of Congress and the states, commenting:

> Our function in constitutional areas is weightier than the Court today suggests; where reasoned analysis shows a practice to be constitutionally deficient, our obligation is to the Constitution, not to Congress.[28]

Finally, the Justice discussed the utility of warrants in search situations and recommended magisterial approval for arrests.[29]

THE *Ramey* DECISION

In his concurring opinion in *Watson*, Justice Stewart emphasized that the Court was not deciding whether or under which circumstances a police officer must obtain a warrant before entering a home to arrest.[30] *People v. Ramey*[31] analyzes those questions. Turner, a security guard, was investigating the burglary of his own home from which several guns had been taken. On a week-day afternoon, Turner went to Ramey's apartment to ask him about the theft. Although Ramey admitted receiving and selling the weapons, he claimed he did not know they were stolen. Turner related this information to Officer Garcia of the Sacramento Police Department. Three hours later, Garcia and five other detectives went to Ramey's home without a warrant. After being admitted into the defendant's apartment, the officers arrested Ramey as he reached behind a portable bar. A gun and narcotics were discovered behind the bar.[32] Ramey's motion to suppress the items was denied, and he appealed.[33]

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itself with the propriety of warrantless arrests when probable cause occurred far enough in advance of arrest to give officers an opportunity to obtain a warrant. Marshall viewed the materialization of probable cause on the seventeenth to be irrelevant to the arrest. Rather, he contended, the inspector had fresh and independent probable cause moments before the arrest on the twenty-third. This probable cause was created by the reliable information (Khoury's signal) concerning a felony taking place in the presence of the officer. Because 18 U.S.C. § 1708, under which Watson was arrested, proscribed obtaining or possessing stolen credit cards, when Watson carried and displayed the cards he was committing a felony. When a felony takes place in an officer's presence, he may, unquestionably, arrest without a warrant. Thus, if the Court had concerned itself with the independence of the August 23 indicia, it could have avoided deciding the propriety of warrantless, non-exigent felony arrests. 44 U.S.L.W. at 4119.

27. *Id.* Justice Powell, in his concurring opinion, agrees. *Id.* at 4117.

28. *Id.* at 4121.

29. *Id.* at 4122. Justice Marshall concluded that the intrusion occasioned by a search is no less severe than an arrest entails. *Id.* at 4121.

30. *Id.* at 4116 (Stewart, J., concurring).

31. 47 Cal. App. 3d 866, 121 Cal. Rptr. 36 (1975).

32. *Id.* at 869, 121 Cal. Rptr. at 38.

33. *Id.* at 868, 121 Cal. Rptr. at 37.

The California court of appeal[34] cited a number of cases permitting warrantless entry to arrest even in the absence of an emergency situation.[35] The court found that the probable presence of weapons in the apartment supplied sufficient exigency to excuse the failure to obtain a warrant.[36]

The California Supreme Court[37] reversed, relying on the statement in *Coolidge v. New Hampshire* that warrantless entries to arrest are per se unreasonable in the absence of exigent circum-

34. The court recognized that the case presented two distinct issues. The first was whether the police acted lawfully in *going to* the defendant's home to arrest him. The second concerned the propriety of the warrantless entry into the home when officers could have obtained a warrant. *Id.* at 871, 121 Cal. Rptr. at 39. Unfortunately, the court neglected to address the first of these issues.

There is at least a theoretical difference between going to a house to arrest and entering a house to arrest. As aptly demonstrated in an amicus brief submitted by the Los Angeles District Attorney's Office, the true issue in *Ramey* was the very issue ignored by the court. *Ramey* dealt with the legality of going to a suspect's home when probable cause exists. People v. Tenney, 25 Cal. App. 3d 16, 101 Cal. Rptr. 419 (1972), held that an officer could go to a house if he had probable cause. Once an officer is outside the home, most often: (1) the defendant exits the house and is arrested outside; (2) the defendant consents to entry of the officer and a peaceful arrest is made inside; or (3) the defendant remains inside the house and refuses to respond to the officer. In the last instance, the officer could legally enter the house by complying with California Penal Code § 844, which allows him to break doors if the suspect does not respond to his knock. Whether an officer ultimately arrests the defendant outside the home, peacefully in the home, or forcibly in the home will depend on the conduct of the suspect. *See* Brief for the People as Amicus Curiae at 11, People v. Ramey, Crim. No. 18795 (Cal. Sup. Ct., Feb. 25, 1976).

Section 844 was established to protect the privacy of the individual in his home, to protect an innocent individual who may be on the premises at the time of the arrest, and to protect both the suspect and the officer from a violent confrontation. *See* Duke v. Superior Court, 1 Cal. 3d 314, 321, 461 P.2d 628, 82 Cal. Rptr. 348 (1969), which requires an officer to announce his identity and purpose before breaking to enter. These requirements may be dispensed with in an emergency situation. *See* Ker v. California, 374 U.S. 23, 53 (1963).

35. The court cited People v. Hill, 12 Cal. 3d 731, 528 P.2d 1, 117 Cal. Rptr. 393 (1974); People v. Terry, 2 Cal. 3d 362, 466 P.2d 961, 85 Cal. Rptr. 109 (1970).

36. The court stated that:

> Appellate judges should not second-guess the police or indulge in refined conjectures when loaded guns in the hands of felony suspects threaten public safety. The circumstances were sufficiently exigent to excuse what might otherwise be charged as an invasion of privacy. 47 Cal. App. 3d at 873, 121 Cal. Rptr. at 40 (1975).

37. People v. Ramey, Crim. No. 18795 (Cal. Sup. Ct., Feb. 25, 1976).

stances.[38] The court maintained an entry to arrest is as intrusive as an entry to search.[39] Because the latter situation requires prior judicial approval, so should the former.[40] The majority discussed a variety of circumstances justifying warrantless arrests but found none existed in the instant case.[41]

THE COMMON LAW ANTECEDENTS[42] OF THE FOURTH AMENDMENT

At common law, a warrant was required for searches but not for arrests.[43] This divergence was the natural by-product of a system that valued the protection of property interests over personal rights.[44] A search involved an invasion of property interests, while an arrest was viewed as merely a seizure of the person. The danger that a suspect might escape before a warrant issued was a further rationale for the discrepancy.[45] Common law permitted non-exigent[46] felony arrests solely on the basis of probable cause.[47] In con-

38. *Id.* at 10. The court cited to a number of jurisdictions that had adopted the language in *Coolidge.*

39. *Id.* at 18.

40. *Id.*

41. The court defined an exigent circumstance, which would excuse any obligation to obtain a warrant, as "an emergency situation requiring swift action to prevent danger to life or to property, or to forestall the . . . escape of a suspect or destruction of evidence." *Id.* at 19. This definition is identical to that utilized in search law. *See* note 14 *supra.*

The court stated that the existence of an exigency varies according to the facts in the case. Crim. No. 18795 at 19. As applied to the facts in *Ramey,* the court found that the defendant was being arrested for an essentially nonviolent offense—receiving stolen property. Additionally, the officer had little reason to believe Ramey still possessed the weapons allegedly taken from Turner's home, because Ramey claimed that he sold them. *See* text accompanying note 32 *supra.* Finally, the court found the three-hour delay provided the officer with sufficient time in which to obtain a warrant. Crim. No. 18795 at 20.

42. The significance of the fourth amendment is found in the historical background in which it was created. *See* District of Columbia v. Little, 178 F.2d 13, 21 (D.C. Cir. 1949) (Holtzoff, J., dissenting).

43. *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 45 (1966).

44. *Id.*; N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-50 (1937) [hereinafter cited as LASSEN].

45. J. LANDYNSKI, *supra* note 43, at 45.

46. *See* 4 W. BLACKSTONE, COMMENTARIES *292; 2 M. HAWKINS, PLEAS OF THE CROWN chs. 12, 13 (8th ed. 1824); 4 J. STEPHENS, COMMENTARIES ON THE LAW OF ENGLAND ch. 16, § 3, at 395 (1845).

47. *See* E. COKE, FOURTH INSTITUTE OF THE LAWS OF ENGLAND 177 (1797); 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 75-84 (first Amer. ed. 1847); 1 J. STEPHENS, A HISTORY OF CRIMINAL LAW OF ENGLAND 193 (1883).

trast, neither private citizens[48] nor judicial officers[49] were permitted to break into a home to seize items[50] or to make a warrantless arrest.[51]

Arrest warrants were used infrequently at common law.[52] When employed, however, they were greeted with a certain measure of suspicion and hostility. The state compelled citizens to assist in the detection and apprehension of offenders[53] and private use of warrants led to abuses. Vengeful individuals could swear out warrants and use them to enlist the assistance of others in their private vendettas.[54]

During the Tudor and Stuart periods,[55] the Crown employed general warrants[56] to investigate sedition matters and to force indiscriminate entry into homes in order to collect revenues.[57] These warrants permitted officials to seize all desired evidence and people,

48. As early as the fifteenth century, a property owner could go onto the land of another whom he suspected of stealing his goods, but he could not enter the suspect's home without a warrant. *See* Y.B. Pasch. 9 Edw. 4, 10 (1470).

49. Constables "broke house" at their own peril. *See* 2 M. HALE, *supra* note 47, at 98-104.

50. *See* Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (1765).

51. For a complete discussion of entry to arrest at common law, see Accarino v. United States, 179 F.2d 456, 460-62 (D.C. Cir. 1949).

52. *See* text accompanying notes 45 and 47 *supra*.

53. *See* J. KAPLAN, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS 90 (1973) [hereinafter cited as KAPLAN]. A professional police force was not established until the nineteenth century because of fear that such a force would be as oppressive as police on the continent had been. *Id.* During the interim, private citizens served as policemen.

54. *See* 1 J. CHITTY, HISTORY OF THE CRIMINAL LAW 53 (1816). Another facet of citizen participation was to raise the "hue and cry" and pursue a suspected felon. *See* Wilgus, *Arrests Without Warrants*, 22 MICH. L. REV. 541, 545 (1924). Unfortunately, the individual who raised the hue and cry on one ultimately acquitted was severely punished. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 583 (1889). Arrest warrants were used by "raisers" to guard against personal liability. *See* Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, in THE SUPREME COURT AND THE CONSTITUTION 49-50 (1970).

55. The Tudor and Stuart periods cover the years between 1471 and 1714.

56. General warrants allowed officers to seize without specificity all persons and all items desired by the Crown.

57. *See* LASSON 20. Sedition prosecution skyrocketed during this period because of intensified political activism and criticism directed at the Crown. *See* R. LOCKYER, TUDOR AND STUART BRITAIN 3-4 (1964). Revenues necessary to support the government and American exploration came from increased taxes. *See* LASSON 13-50.

and to take money for the payment of taxes.[58] When taxation was imposed on the American Colonies, general warrants accompanied it.[59] The fourth amendment was adopted precisely in reaction to the general warrant.[60] The framers drafted the amendment to neutralize the arbitrary power of the government to search and arrest at will.[61] In the hope of restoring common law practices, the amendment required a warrant to be both sufficiently exact and founded on just cause.[62] The fourth amendment "does not prohibit arrest without a warrant, but, simply, the unauthorized issuance of a warrant without oath or affirmation."[63]

THE STATUS OF FELONY[64] ARREST LAW

Statutory law provides for warrantless arrests by federal officers.[65] When federal statutes do not cover a particular situation, the law of the state in which the seizure takes place controls.[66] State arrest law is also primarily statutory. A majority of states has adopted the mandate of *Carroll v. United States*:[67] "[A] police officer may arrest without a warrant one believed by the officer upon probable cause to be guilty of a felony."[68] These statutes ac-

58. As a result of court decisions and popular pressure, the English people were eventually able to rid themselves of the general warrant. *See* LASSON 53.

59. *Id.*

60. Both James Otis and Patrick Henry addressed themselves to the injustices of general warrants. *See* J. MCMASTER & F. STONE, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 58 (1888). It was solely to shield against the use of general warrants that Patrick Henry stressed that the fourth amendment be passed. *See* J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 588 (1836).

61. *See* Warden v. Hayden, 387 U.S. 294 (1967); Frank v. Maryland, 359 U.S. 360, 363 (1958).

62. *See* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969).

63. 6A C.J.S. *Arrest* § 10 (1975).

64. In contrast to felony arrests, an officer must have a valid warrant or have seen the offense committed in order to arrest for a misdemeanor. 18 U.S.C. § 3052 (1964). The rationale for this difference in treatment was stated in *People v. Williams*, 17 Cal. App. 3d 554, 562, 95 Cal. Rptr. 233 (1971):

> The statute [dealing with misdemeanor arrests] impliedly recognizes the obvious fact that most felonies will not occur in the presence of an officer and that the protection of society against serious crime is better served by granting a broader base for felony arrests.

65. Federal officers are authorized to arrest without a warrant. *See* notes 18-20 *supra*. State or federal officers must have probable cause to arrest. *Id.*; CAL. PENAL CODE § 836 (West 1957); ALI CODE OF PRE-ARRAIGNMENT PROCEDURES § 120 (1975).

66. *See* United States v. Di Re, 332 U.S. 581, 589 (1947).

67. 267 U.S. 132 (1925).

68. *Id.* at 156-57. The following state statutes adhere to the *Carroll* rule:

count in part for the under-utilization of arrest warrants.[69] Both federal and state law authorize warrantless entries into the home to effect an arrest,[70] although a preference for prior judicial ap-

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ALA. CODE tit. 15, § 154 (1959); ALASKA STAT. § 12.25.030 (1973); ARIZ. REV. STAT. ANN. § 13-1403 (Supp. 1973); ARK. STAT. ANN. § 43-403 (1964); CAL. PENAL CODE § 836 (West 1970); CONN. GEN. STAT. ANN. § 6-49 (1972); DEL. CODE ANN. tit. 11, § 1906(b) (1975); D.C. CODE ANN. § 23-581(a)(1)(A) (1973); FLA. STAT. ANN. § 901.15 (1973); HAWAII REV. STAT. tit. 37 § 708-5 (1968); IDAHO CODE § 19-603 (1948); ILL. REV. STAT. ch. 38 § 107-2(c) (1973); IOWA CODE § 755.4 (1950); KAN. STAT. ANN. § 13-623 (1964); KY. REV. STAT. ANN. § 431.005(1) (1969); LA. CODE CRIM. PRO. ANN. art. 213 (West 1967); MD. ANN. CODE art. 27, § 594B (1971); MICH. STAT. ANN. § 764.15 (1972); MINN. STAT. ANN. § 629.34 (1947); MISS. CODE ANN. § 99-3-7 (1973); NEB. REV. STAT. § 29-404.02 (Cum. Supp. 1969); NEV. REV. STAT. § 171.124 (1973); N.H. REV. STAT. ANN. § 594.10 (1974); N.J. REV. STAT. ANN. §§ 40:174-166, 40:174-196 (1967); N.Y. CRIM. PRO. LAW § 140.10 (McKinney 1971); N.C. GEN. STAT. § 15A-104(b)(2) (1975); N.D. CENT. CODE § 29-06-15 (1974); OHIO REV. CODE ANN. § 2935.04 (1954); OKLA. STAT. ANN. tit. 22, § 196 (1969); ORE. REV. STAT. § 133.310 (1971-1972); R.I. GEN. LAWS ANN. § 12-7-4 (1970); S.C. CODE ANN. § 17-251 (1962); S.D. COMP. LAWS ANN. § 23-22-7 (1969); TENN. CODE ANN. § 40-803 (1955); UTAH CODE ANN. § 77-13-3 (Supp. 1973); VT. CODE OF CRIM. PRO. Rule 3(a) (1974); VA. CODE ANN. § 19.1-100 (Cum. Supp. 1974); WIS. STAT. § 986.07 (1971); WYO. STAT. ANN. § 7-155 (1959). For this rule applied in Washington, see State v. Kohler, 70 WASH. 2d 599, 424 P.2d 656 (1967); in Virginia, see Hill v. Smith, 107 Va. 848, 59 S.E. 475 (1907); in West Virginia, State v. Hammond, 96 W. Va. 96, 122 S.E. 363; State v. Brown, 101 W. Va. 160, 132 S.E. 366 (1926).

Colorado requires a warrant when practical. COLO. REV. STAT. ANN. § 16-3-102 (1974). Georgia allows warrants to be dispensed with in emergencies. GA. CODE ANN. § 27-207 (1972); Thomas v. State, 91 Ga. 204, 18 S.E. 305 (1892). IND. ANN. STAT. § 9-1024 (1956) allows warrantless arrestees to be held only until a warrant can be obtained. Warrantless arrests generally conform to the *Carroll* standard. *See* Hanger v. State, 199 Ind. 727, 160 N.E. 444 (1928). In Maine, warrantless arrestees must receive a speedy post-arrest hearing. ME. REV. STAT. ANN. tit. 15, § 704 (1965). Massachusetts statutory law does not mention a warrant. MASS. GEN. LAWS ch. 41, § 98 (1973), but case law holds that warrantless arrests are valid. See Commonwealth v. Lawton, 348 Mass. 129, 202 N.E.2d 824 (1964). In Missouri, no statute allows warrantless seizures, but decisions of the supreme court have authorized such arrests if the police obtain a warrant after the arrest. See State v. Padgett, 316 Mo. 179, 289 S.W. 954 (1926); State v. Hall, 312 Mo. 425, 279 S.W. 102 (1926). MONT. REV. CODE ANN. § 95-608(d) (1969) authorizes warrantless arrests in exigent circumstances. New Mexico courts have validated warrantless seizures. *See* Territory v. McGinnis, 10 N.M. 269, 61 P. 208 (1900); State v. Selgado, 76 N.M. 187, 413 P.2d 469 (1966). Pennsylvania embodies the common law practices. PA. STAT. ANN. tit. 19, § 12.7 (Supp. 1974). Texas prefers a warrant. *See* Honeycutt v. State, 499 S.W.2d 662 (Ct. of Crim. App. 1964).

69. *See* J. LANDYNSKI, *supra* note 43, at 45.

70. *See, e.g.*, Agnello v. United States, 269 U.S. 20, 32 (1925); ALA.

proval has often been voiced.[71] Of course, a warrant is not required when exigent circumstances are present.[72]

A significant problem arises in a non-emergency situation wherein the officer has an adequate opportunity to obtain a warrant. *Watson's* approval of warrantless, non-exigent arrests in public places resolves only half the problem.[73] The other half, inva-

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CODE tit. 15, § 155 (1958); ALASKA STAT. § 12.25.100 (1962); ARIZ. REV. STAT. ANN. § 13-1411 (1956); CAL. PENAL CODE § 844 (West 1970); FLA. STAT. ANN. § 901.19(1) (1944); HAWAII REV. STAT. tit. 37, § 708-11 (1968); IDAHO CODE § 19-611 (1947); IND. ANN. STAT. § 9-1009 (1956); IOWA CODE § 755.9 (1950); KY. REV. STAT. ANN. § 70.078 (1969); LA. CODE OF CRIM. PRO. ANN. art. 224 (1967); MICH. STAT. ANN. § 28.880 (1954); MINN. STAT. ANN. § 629.34 (1947); MISS. CODE ANN. § 2471 (1942); MO. ANN. STAT. § 544.200 (1953); MONT. REV. CODES ANN. § 95-602(c) (1969); NEB. REV. STAT. § 29-411 (1964); NEV. REV. STAT. § 171.142 (1969); N.Y. CODE CRIM. PROC. § 175 (1958); N.C. GEN. STAT. § 15-44 (1965); OHIO REV. CODE ANN. § 2935.12 (1954); OKLA. STAT. ANN. tit. 22, § 194 (1969); ORE. REV. STAT. § 133.320 (1969); S.C. CODE ANN. § 53-198 (1962); S.D. COMP. LAWS ANN. § 23-22-18 (1967); TENN. CODE ANN. § 40-807 (1955); UTAH CODE ANN. § 77-13-12 (1953); WASH. REV. CODE ANN. § 10.31.040 (1961); WYO. STAT. ANN. § 7-165 (1957).

71. There is a continuing preference for the use of an arrest warrant. *See* McCray v. Illinois, 386 U.S. 300, 314 (1967) (Douglas, J., dissenting, in which Justice Douglas is joined by Justices Warren, Brennan, and Fortas in urging that an arrest warrant be obtained whenever possible. (Justice Brennan took part in Justice Marshall's dissent in *United States v. Watson.*)

72. United States v. Watson, 44 U.S.L.W. 4112, 4122 (U.S. Feb. 4, 1976) (Marshall, J., dissenting).

73. See Justice Powell's concurrence in *Watson* for the proposition that no decision handed down by the Court has directly concerned a warrantless non-exigent arrest in a public place. *Id.* at 4117 (Powell, J., dissenting). Powell states that all the cases cited by the majority to support its principle themselves involved emergency situations. Therefore, they could not be relied upon to establish the propriety of warrantless arrests in all circumstances.

Prior to *Watson,* there was a split of opinion as to the validity of non-exigent warrantless arrests. For decisions denying that a warrant was required in non-emergency circumstances, by dicta or otherwise, see Coolidge v. New Hampshire, 403 U.S. 443 (1970); Chimel v. California, 395 U.S. 752, 777 (1968); Trupiano v. United States, 334 U.S. 699 (1948); United States v. Rabinowitz, 339 U.S. 56 (1948); United States v. Gonzales, 483 F.2d 223, 225 n.2 (2d Cir. 1973); Daley v. United States, 261 F.2d 870 (5th Cir. 1958); State v. Ramirez, 284 So. 2d 241, 243 (Fla. App. 1973); J. WHARTON, CRIMINAL PROCEDURE § 61, at 162 (12th ed. 1974). The ALI *Code of Pre-Arraignment Procedures,* as well, does not require a warrant. The rationale offered is that:

> [S]uch a requirement would be entirely novel . . . .
> [T]he need for it is not urgent and the subsequent litigation such an inquiry would authorize would be indeterminate and difficult.

ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § 120.1, Comment at 303 (1975).

In contrast, in Wheeler v. Goodman, 330 F. Supp. 1356, 1370 (W.D.N.C. 1971), the court stated that a warrant was necessary unless an emergency existed. The court justified its view by reference to Beck v. Ohio, 379 U.S. 89 (1964):

> An arrest without a warrant bypasses the safeguards provided by an objective predetermination. . . . [P]robable cause substitutes

sions of the home, has not been resolved thus far for all states.[74] In fact, many courts have uncritically *assumed* the validity of warrantless invasions.[75]

However, several years ago, one court began to question this assumption, indicating disfavor with invasions of the home absent prior magisterial approval.[76] Rejecting the presumption of propriety for warrantless entries and discussing the comparative significance of the competing interests involved, the District of Columbia Circuit[77] concluded that "the fourth amendment is to be construed in a manner which will conserve public interests as well as the interests and rights of individual citizens."[78] Subsequently, in *Accarino v. United States*,[79] the same court found the fundamental right to privacy in the home is outweighed only by an emergency situation or by an essential[80] opposing interest.[81] By 1970, the cir-

> . . . the far less reliable procedure of an after the event justification for the arrest . . . which is too likely to be substantially influenced by the familiar shortcoming of hindsight. 330 F. Supp. at 96.

74. The United States Supreme Court has never ruled on the legality of a warrantless entry in the absence of exigent circumstances. *See* Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975); Ker v. California, 374 U.S. 23 (1963); Jones v. United States, 357 U.S. 493, 499-500 (1957).

75. *See* Coolidge v. New Hampshire, 403 U.S. 443, 511-12 n.1 (Burger & White, J.J., concurring and dissenting). *See also* United States v. Watson, 44 U.S.L.W. 4112, 4114 (U.S. Feb. 4, 1976); People v. Ramey, Crim. No. 18795, at 18 n.7 (Cal. Sup. Ct., Feb. 25, 1976).

States contribute to the confusion by not clarifying under which circumstances a home may be entered. *See* note 70 *supra*.

76. *See* District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949).

77. The court discussed the pressing need of the city to inspect dwellings for health code violations, *id.* at 20, but concluded that the right to privacy overcame that interest. *Id.* at 17, 20. However, an emergency could alter the situation. *Id.* at 20.

Even the dissenting opinion made use of this method of weighing the competing interests. Judge Hortzoff stated that the sanctity of the home was not absolute but rather was subject to some restrictions. One such situation, he stated, was the right of the state to conduct warrantless health inspections in order to further public interests. *Id.* at 25.

78. *Id.* at 21.

79. 179 F.2d 456 (D.C. Cir. 1949).

80. This language interestingly forecasts an important aspect of privacy law developed by the Court years after *Accarino* had been decided. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court reiterated the fundamentality of the right to privacy. A state statute, motivated by an interest in the general welfare, must represent a compelling need in order to infringe on the right to privacy and nevertheless to be sustained by the judiciary. For instances in which a lesser personal interest clashes with a state regulation, the state law need only be rationally related to a legitimate state interest in order to be valid. *Id.* at 497-98.

81. 179 F.2d at 458.

cuit court had assembled an array of factors relevant to the balancing process.[82] The determination of where and under which circumstances the right to privacy must yield to the right of law enforcement is dependent on these factors.[83] The District of Columbia Circuit's enlightened perception of the need for balancing the interests involved has been adopted by a number of jurisdictions.[84]

The Balance of Interests

The Interests Present in Arrest Situations

Two aspects of the individual's right to privacy in arrest situations are his right to mobility[85] and his ability to conduct himself in private.[86] Like all other constitutional rights, the right to privacy is subject to reasonable restrictions.[87] In *Katz v. United States*,[88] the Supreme Court attempted to clarify the permissible re-

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82. Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc). Among these circumstances are:

(1) whether a serious offense, particularly a crime of violence, is involved;
(2) whether the suspect is reasonably believed to be armed;
(3) whether there is a clear showing of probable cause;
(4) whether strong reason exists to believe the suspect will escape if not swiftly apprehended;
(5) whether the entry is forcible or peaceful; and
(6) whether the entry is at night. *Id.* at 390-91.

83. *Id.*

84. *Ramey* documents another jurisdiction that has viewed the balance in a light more favorable to individual rights. Other jurisdictions have concurred. *See* United States v. Shye, 492 F.2d 886, 891 (6th Cir. 1974); United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974); Salvador v. United States, 505 F.2d 1348, 1351-52 (8th Cir. 1974); Vance v. North Carolina, 432 F.2d 984, 990-91 (4th Cir. 1970); United States v. Rodriguez, 375 F. Supp. 589, 593 (S.D. Tex.), *aff'd*, 497 F.2d 172 (5th Cir. 1974); Huotari v. Vanderport, 380 F. Supp. 645, 649-51 (D. Minn. 1974); Commonwealth v. Forde, — Mass. —, 329 N.E.2d 717 (1975); Nilson v. State, 272 Md. 179, 321 A.2d 301 (1974); People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971).

85. *See* A. Greenwalt, The Right of Privacy and the Rights of Americans 299, 373 n.3 (1971). This aspect of the right was recognized as early as 1890, when it was characterized as the right to be "let alone." Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

Similarly, derivations of this right have been noted by the Supreme Court in automobile search cases. Therein, the Court pays deference to the "free right of passage without interference." United States v. Almeida-Sanchez, 413 U.S. 266 (1973).

86. *See* A. Westin, Privacy and Freedom 7 (1967). The author refers to this as the right of selective disclosure. It gives the individual the ability to choose how, if at all, information about him will be gathered through observation.

87. *See* Elkins v. United States, 364 U.S. 206, 222 (1960); District of Columbia v. Little, 178 F.2d 13, 24 (D.C. Cir. 1949) (Holtzoff, J., dissenting).

88. 389 U.S. 347 (1967).

strictions on this right. Prior to that decision, physical intrusions by the government into "constitutionally protected areas" triggered fourth amendment protection.[89] *Katz* established a "reasonable expectation" test presumably to replace this location-oriented approach to the right of privacy.[90] The reasonableness of the expectation depends on one's subjective view as well as on whether society would agree that the individual deserves protection.[91] Justice Harlan, however, wisely foresaw that the reasonableness of an expectation of privacy cannot be divorced from the context in which the right is asserted.[92] Whether the fourth amendment protects the

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89. *See* Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy, or A Man's Home is His Fort*, 23 CLEV. L. REV. 63 (1972). In essence, the rights of suspects were definable in terms of the place they happened to be when the intrusion occurred. Under the pre-*Katz* classification scheme, fourth amendment protection was afforded to the following areas: the home, Weeks v. United States, 232 U.S. 383 (1914); business offices, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); stores, Amos v. United States, 255 U.S. 313 (1921); hotel rooms, United States v. Jeffers, 342 U.S. 48 (1951); autos, Henry v. United States, 361 U.S. 98 (1959); and taxis, Rios v. United States, 364 U.S. 253 (1960).

However, open fields, Hester v. United States, 265 U.S. 159 (1924), and jails, Lanza v. New York, 370 U.S. 139, 143-45 (1962) are not protected.

90. 389 U.S. at 352.

91. *Id.* at 361 (Harlan, J., concurring). Unfortunately, *Katz* created more confusion than clarity. Cases in the various jurisdictions following the *Katz* decision documented conflicts among the courts as to which type of conduct constitutes an invasion, thereby invoking the protection of the fourth amendment. *See* Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy, or A Man's Home is His Fort*, 23 CLEV. L. REV. 63 (1972).

92. Subsequent to *Katz*, a reasonable expectation of privacy has been found to exist in the home, United States v. Rubin, 343 F. Supp. 625 (E.D. Pa. 1972); a dorm room, Piazolla v. Watkins, 442 F.2d 284 (5th Cir. 1971); an office, Mancusi v. DeForte, 392 U.S. 364 (1968); a restroom, Brown v. State, 3 Md. App. 90, 238 A.2d 147 (1968) (a physical intrusion) and People v. Metcalf, 22 Cal. App. 3d 20, 98 Cal. Rptr. 925 (1971) (surreptitious surveillance).

There is no reasonable expectation of privacy in jails, United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); open fields, United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972); and yards, People v. Bradley, 1 Cal. 3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969).

California adheres to the location-oriented approach to privacy rights. *See* People v. Dumas, 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973).

individual's privacy in a particular instance depends largely on *where* he is at the time.[93]

The other side of the balance represents the interests of the state. Undeniably, society has a valid objective in apprehending criminals.[94] This interest, however, is tempered to the extent its accomplishment infringes upon significant personal rights.[95] Even absent an opposing fundamental right, law enforcement procedures must possess a demonstrable connection to effective criminal investigations. Nevertheless, an objective assessment of the nexus between a procedure and a proper state goal is extremely difficult.[96] In the case of arrest law, it is questionable whether anyone can document that the absence of a warrant requirement in non-exigent circumstances will assist law enforcement efforts sufficiently to overcome concomitant deprivations of personal rights.[97] Courts often must be guided merely by what Justice Cardozo called "a robust common sense."[98] In the alternative, they may simply defer to the judgment of the legislature.[99] Ultimately, any court engaging in the balancing process must weigh the fundamentality of the individual right—here, the right to privacy—against the necessity for state action.

The Balance of Interests in Non-Exigent Public Arrests: A Critical Comment

The holding in *Watson* represents a certain anomoly. The fourth amendment demands a warrant for all non-exigent searches.[100]

93. *See* Katz v. United States, 389 U.S. 347 (1967).

94. This is justified by the state's legitimate interest in its own self-protection. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975) (Douglas, J., concurring).

95. *See* notes 80, 87 *supra.*

96. *See* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 226 (1965).

97. The majority opinion in *Watson* mentioned the encumbrance on law enforcement that a warrant requirement for non-exigent arrests would occasion. 44 U.S.L.W. at 4114. However, the Court did not elaborate. Surface examination of the consequences of a warrant requirement would reveal minimal quantitative encumbrances on law enforcement because most arrests do not take place under non-exigent circumstances. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 8 (1972). More penetrating analysis, on the contrary, indicates that such a requirement in public arrests would cut short the criminal investigation process by which innocent suspects may be cleared and sufficient evidence against the suspect amassed. *See* text accompanying notes 108 and 109 *infra.* Thus, qualitatively, law enforcement investigations would suffer.

98. Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

99. *Watson* stands as an obvious example of this deference. *See* text accompanying notes 23 and 25 *supra.*

100. *See* United States v. United States Dist. Court, 407 U.S. 297, 314-21 (1972); Jones v. United States, 357 U.S. 493, 499 (1958).

Even probable cause will not excuse the failure to obtain a warrant.[101] Justice Jackson maintained that permitting warrantless searches would:

> [R]educe the amendment to a nullity and leave the people's homes secured only in the discretion of police officers. When the right of privacy must necessarily yield is to be determined by a judicial officer, not by a policeman.[102]

Why the standard for searches should be different from that applicable to arrests has long puzzled some courts.[103] However, this distinction is defensible for several reasons.

First, the possibility always exists that the suspect will escape. An automobile possesses a similar potential for mobility.[104] Accordingly, the courts have created an exception to the general search warrant requirement for the auto,[105] solely because of its inherent ability to evade seizure.[106] It defies logic to justify an exception to the warrant requirement for autos because they are potentially mobile and to require a warrant for individuals who have the same escape capabilities.

Second, undue limitations would be placed on the investigatory function of law enforcement if judicial approval to arrest is required at the moment probable cause arises. Police often have a legitimate reason to refrain from arresting at the exact time prob-

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101. Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971); Katz v. United States, 389 U.S. 347, 356-58 (1967).

102. Johnson v. United States, 333 U.S. 10, 14 (1948).

103. *See* Justice Powell's concurring opinion in *Watson*. 44 U.S.L.W. at 4117 (Powell, J., concurring).

104. A person has the same potential for escape that an auto has. *See* United States v. Hale, 348 F.2d 837 (2d Cir. 1965). Justice Clark pointed this out in his dissent in *People v. Ramey*. Ramey had certainly been alerted by Turner's visit, and he had the opportunity to flee. Nevertheless, the court did not consider this factor. Crim. No. 18795 at 8-9 (Cal. Sup. Ct., Feb. 25, 1976) (Clark, J., dissenting).

105. Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

106. This exception has been utilized even when the auto was incapable of moving. In *Chambers*, the auto was taken to police headquarters and searched there under guard. The Court rationalized this later search as no more intrusive than would have been one conducted at the scene. 399 U.S. at 51 (no more intrusive, perhaps, but certainly much less exigent).

In Cardwell v. Lewis, 417 U.S. 583 (1974), the Court approved a warrantless extraction of paint scrapings and tire imprints while the auto was in a commercial lot and the defendant was in custody.

By implication, the Court in these two decisions focuses primarily on the

able cause materializes.[107] Information gathered by police between the time probable cause arises and the ultimate arrest possibly can exculpate the innocent suspect[108] and ensure that sufficient evidence is gathered to allow conviction of the guilty suspect and accomplices.[109] Requiring that an arrest warrant be obtained at the moment probable cause arises prematurely terminates a complete investigation.

Third, even if a warrant is generally required, an arrestee would not be assured prior judicial approval in all situations. An officer might fail to recognize when probable cause arises. Thereafter, the occurrence of an "exigency,"[110] such as observing the suspect committing a felony,[111] will excuse the former's duty to obtain a warrant.[112] As the Supreme Court held in *Cardwell v. Lewis*,[113] "[t]he exigency may arise any time and the fact that police might have obtained a warrant earlier does not negate the possibility of a current situation necessitating prompt police action."[114] The primary thrust of an arrest warrant requirement is to assure magisterial approval of arrests in situations in which the existence of probable cause is not so obvious.[115] When an officer fails to recognize unobvious indicia of guilt, the suspect can be precluded entirely from obtaining the objective evaluation a warrant requirement is designed to assure.

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inherent nature of the auto as being capable of mobility rather than ascertaining, in each situation, if the car could be moved.

107. *See* Godfrey v. United States, 358 F.2d 850 (D.C. Cir. 1966).

108. *See* Petitioner's Brief for Certiorari at 23, United States v. Watson, 44 U.S.L.W. 4112 (U.S. Feb. 4, 1976).

109. *See* United States v. Murray, 492 F.2d 178, 189 (9th Cir. 1973); State v. Birdwell, 6 Wash. App. 284, 492 P.2d 249 (1972).

Watson is an excellent example of officers delaying the arrest to catch the defendant with more credit cards, compounding violations of 18 U.S.C. § 3061. 44 U.S.L.W. at 4113.

Extensive delays are allowed in narcotics cases in order to protect the undercover agent from premature identification. *See* Abramson v. United States, 326 F.2d 565 (5th Cir. 1964); Dailey v. United States, 261 F.2d 870 (5th Cir. 1958).

110. The term *exigency* also includes situations in which the defendant might attempt to flee, destroy evidence or contraband, or in which he presents a danger to himself, the officer, or others. *See* notes 14 and 41 *supra*.

111. This was the fact situation in Trupiano v. United States, 334 U.S. 699 (1948).

112. Cardwell v. Lewis, 417 U.S. 583 (1974); Trupiano v. United States, 114 U.S. 699 (1948).

113. 417 U.S. 583 (1974).

114. *Id.* at 595-96.

115. Logically, a suspect against whom sufficient indicia of guilt have been amassed is less in need of evaluation of the sufficiency of the cause upon which he is arrested than is the individual who is confronted by criminal evidence of a doubtful nature.

Finally, the present system provides more safeguards for an individual arrested without prior judicial approval than for one arrested pursuant to a warrant. Warrantless arrests require a greater quantum of probable cause than do those effected with a warrant.[116] Additionally, if a defendant arrested without a warrant challenges the validity of his seizure, the state carries the burden of proof that the invasion did not violate his rights.[117] In cases where probable cause is doubtful, the police officer must obtain a warrant.[118] In contrast, when probable cause is obvious, there is less need for magisterial objectivity. Arrestees seized without a warrant have the right to a speedy post-arrest hearing[119] to determine the sufficiency of the cause upon which they were arrested.[120] Ideally, this hearing requirement will act as a further deterrent to lawless police behavior.[121] Moreover alternatives to detention are available to warrantless arrestees that are not permitted those arrested on a warrant.[122]

116. *See* United States v. Ventresca, 380 U.S. 102, 106 (1964); People v. Madden, 2 Cal. 3d 1017, 1023, 471 P.2d 971, 88 Cal. Rptr. 171 (1970).

117. Gatlin v. United States, 326 F.2d 666 (D.C. Cir. 1963), *cert. denied*, 394 U.S. 1049 (1965); Michenfelder v. City of Torrance, 28 Cal. App. 3d 202, 104 Cal. Rptr. 501 (1972). In addition to this, the American Bar Association Standards for District Attorneys forbids a prosecutor from instituting criminal charges against a defendant which are not supported by probable cause. ABA CODE OF PROFESSIONAL RESPONSIBILITY DA 7-103 (Final Draft 1969).

An aggrieved defendant may also bring a suit against the police department for violation of his civil rights under the 1871 Civil Rights Act. *See, e.g.*, Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966). This suit lies in addition to the ordinary civil suit that may be instituted against the police department for false arrest.

Finally, it is relatively easy for an innocent suspect to have his arrest record expunged. Note, *The Expungement or Restriction of Arrest Records*, 23 CLEV. L. REV. 495 (1972). The author surveys a variety of methods whereby the effects of an arrest can be erased.

118. Wong Sun v. United States, 371 U.S. 471 (1963).

119. Gerstein v. Pugh, 420 U.S. 103 (1975).

120. *Id.* at 112. The Court found a more pressing need for a hearing at this point than before arrest because pretrial confinement could jeopardize one's job, family life, and other relationships. *See* R. GOLDFARB, RANSOM 32-91 (1965). The Court added that this hearing would not be a "critical" stage of the criminal investigation process; therefore, it would not be adversary and would not require that the defendant be represented by an attorney.

121. The main thrust of the exclusionary rule became deterrence. *See* Terry v. Ohio, 392 U.S. 1, 12 (1968). Similarly, *Gerstein* may further encourage police not to arrest without probable cause. 420 U.S. 103.

122. Both the ABA and ALI Standards encourage use of citations in lieu

The balance of interests in public arrest begins by contrasting the rights of the individual against the interests of the state. On the individual interests side, each person has both the right of personal mobility free from arbitrary governmental intrusion[123] and the right to be secure from public view. The state's interests are apprehending criminals who have the potential for escape and thoroughly investigating criminal activities.

The personal interests at stake, however, are subject to reasonable limitations.[124] The right to personal mobility is protected against only arbitrary and capricious police practices. The strict standard of probable cause places a sufficient barrier between overzealous officers and the individual.[125] The accompanying expectation of secrecy is neither rational nor compelling in a public arrest. The fact that a suspect is in an area exposed to public view radically diminishes his rightful anticipation of privacy.[126] Even if he subjectively

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of confinement. This is applicable only to warrantless arrest situations. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § 120.2 (1975); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PRETRIAL RELEASE 2.1 (1974).

In California, an officer may release an arrestee taken without a warrant when appropriate. CAL. PENAL CODE § 849 (West 1971) provides in pertinent part:

> (b) Any peace officer may release from custody . . . any person arrested without a warrant whenever:
>
> (1) he is satisfied that there are insufficient grounds for making a criminal complaint . . . ,
>
> (2) the person arrested was arrested only for intoxication, and no further proceedings are desirable,
>
> (3) the person was arrested only for being under the influence of a narcotic, drug, or restricted dangerous drug and such person is delivered . . . to a hospital for treatment . . . .

123. *See* Wong Sun v. United States, 371 U.S. 471 (1963); Commonwealth v. Swanger, 307 A.2d 875, 878 (Pa. 1973).

124. *See* text accompanying note 87 *supra*.

125. *See* United States v. Watson, 44 U.S.L.W. 4112 (1976); Gerstein v. Pugh, 420 U.S. 10 (1975). Reporters of the American Law Institute's *Code of Pre-Arraignment Procedures* concluded that they "could not improve on the traditional probable cause standard." ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § 120.1, Comment (1975).

126. The Court noted in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973):

> [T]he constitutionally protected privacy of family, marriage, motherhood, procreation and child rearing is . . . a protected intimate relationship. [However] obviously there is no necessary or legitimate privacy which would extend to marital intercourse on a street corner or a theatre stage. *Id.* at 66 n.13.

In Cardwell v. Lewis, 417 U.S. 583 (1974), the Court elaborated on the rationale for affording autos a lesser degree of protection and privacy:

> One has a lesser expectation of privacy in a motor vehicle. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and contents are in plain view. *Id.* at 590.

expects privacy, it is difficult to maintain that society should recognize that expectation because "the idea of a privacy right and a place of public accommodation are mutually exclusive."[127]

Collateral factors weigh in favor of the state's interest. The common law recognized an officer's ability to arrest publically in non-exigent circumstances.[128] This practice was transplanted into federal and state arrest law[129] and creates precedent disfavoring a warrant requirement.[130] The balance of interests must also take cognizance of the fact that many procedural safeguards attach to warrantless arrests.[131] These safeguards sufficiently protect the limited privacy rights involved. Because of the substantial interest of law enforcement in effective and thorough investigation, a warrant should not be required for non-exigent public arrests.

The Balance of Interests in Home Arrests

The right to be secure in the privacy of one's own home is basic to the fourth amendment.[132] An arrest in the home restricts the defendant's personal mobility, and it also infringes on his right privately to possess certain things and to conduct himself out of the view of others. This intrusion into his personal effects is the consequence primarily of the plain-view[133] and search incident to arrest[134] doctrines.

The plain-view exception to the search warrant requirement permits an officer, once in the home, to view evidence of the suspected crime[135] as well as anything else the suspect keeps in his home.[136]

127. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973).
128. *See* text accompanying notes 46 and 47 *supra*.
129. *See* J. LANDYNSKI, *supra* note 43, at 45.
130. Justice Powell, concurring in *Watson*, stated, the "logic" of utilizing search safeguards on arrest situations must defer to history and experience. 44 U.S.L.W. at 4117.
131. *See* text accompanying notes 116-122 *supra*.
132. *See* Berger v. New York, 388 U.S. 41, 53 (1967); Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Jones v. United States, 357 U.S. 493 (1958).
133. The plain-view doctrine permits an officer to seize items he sees when he is within an area where he had a right to be. United States v. Cupp, 503 F.2d 277 (6th Cir. 1974). The seizure may be of weapons or contraband, Chimel v. California, 395 U.S. 752 (1969); or of any item of evidentiary value for the target offense or any other, Warden v. Hayden, 387 U.S. 294, 304 (1967).
134. *See* Chimel v. California, 395 U.S. 752 (1969).
135. *See* note 133 *supra*.
136. Comonwealth v. Forde, ___ Mass. ___, 329 N.E.2d 717 (1975).

The chill on privacy rights[137] inherent in the plain-view doctrine necessitates magisterial supervision of intended invasions into the dwelling. Like utilization of the plain-view doctrine, a search incident to arrest presents possible alarming consequences for homeowners. Incidental searches were originally permitted to safeguard against destruction of evidence and danger to persons or property occasioned by an arrest.[138] Despite the limited purpose ascribed to incidental searches, they have been allowed outside the immediate reach of the defendant,[139] into other rooms,[140] and into covered boxes and closed drawers.[141] The potential for serious infringement upon a suspect's personal life by use of these types of searches mandates exceptional protection for home arrests. Indeed, the very act of police scanning the room is itself an infringement on fundamental rights.[142] The need for a higher degree of protection for the dwelling place is consistent with the Supreme Court's definition of an individual's freedom within his home:

> A man may be entitled to read an obscene book in his room or expose himself indecently there . . . . We should protect his privacy. But, if he demands a right to obtain the books . . . in a public place, then to grant him his right to affect the world around the rest of us . . . .[143]

Courts have recognized a basic difference between the expectation of privacy in public and in the home.[144] In contrast to the limited right to privacy in public places, the home stands as a private enclave where the freedom to escape the intrusions of society is all but absolute.[145] In his home, an individual is reasonable in anticipating full fourth amendment protection. This substantial right to sanctity in the home must take precedent over the state's objection

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137. Because officers may view items even if the defendant does not happen to be in his home at the time of the entry, *see* Love v. United States, 170 F.2d 32, 33 (4th Cir. 1948), many commentators believe that searches for suspected criminals may present a convenient excuse for harassing raids on unpopular groups and give the police a means of obtaining entry into a building they wish to explore but for which they do not have sufficient evidence to obtain a warrant. *See* Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 STAN. L. REV. 995 (1971).

138. Commonwealth v. Forde, ___ Mass. ___, 329 N.E.2d 717 (1975).

139. People v. Reilley, 53 Cal. App. 3d 40, 45, 125 Cal. Rptr. 504, 508 (1975).

140. *Id.*

141. *Id.*

142. In *Commonwealth v. Forde*, the court stated that "the crux of the unconstitutional invasion . . . lay in the roving eyes of the arresting officer who [enters] the premises." ___ Mass. at ___, 329 N.E.2d at 725.

143. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973).

144. *See* Accarino v. United States, 179 F.2d 456, 464 (D.D.C. Cir. 1949).

145. Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 479 (1894).

to the inconvenience of obtaining a warrant under non-exigent circumstances. Because the difference between entry to seize items and entry to seize people is little more than conceptual,[146] the balance struck in favor of warrants for search and seizure should, as *Ramey* held, attach to arrest entries:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. . . . [T]he wind may blow through it, but the King of England may not enter.[147]

The fourth amendment's guaranty of privacy in the dwelling-place has been expanded by the Supreme Court to include business offices.[148] Those portions of commercial premises which are not open to the public[149] require a slightly lesser degree of protection than does the home,[150] but far greater privacy than does a public place because office personnel can "reasonably . . . expect that only . . . their personal or business guests would enter the office."[151] An arrest warrant would shield this expectation from unsupervised invasion by use of the plain-view and search incident to arrest doctrines. For this reason, warrants should be obtained also for non-exigent arrests taking place in private business offices.

CONCLUSION

As the Supreme Court in *Watson* points out, history, precedent, and policy considerations underlie the lack of a warrant requirement in non-exigent public arrests. Privacy law, as well, justifies this conclusion, for there is no reasonable expectation of privacy in public places. Finally, the fourth amendment requires simply that an individual be free from arbitrary intrusion on his right of personal mobility. The probable cause standard satisfies this requirement. However, the expectation of privacy is much stronger and more vital in the home.

It is difficult to reconcile the judiciary's reverence for the home in the context of a search with the attitude of most courts when

146. *See* Commonwealth v. Forde, ___ Mass. ___, ___, 329 N.E.2d 717, 722 (1975).
147. *Quoted in* F. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 611.
148. Mancusi v. DeForte, 392 U.S. 364, 367 (1968).
149. See v. City of Seattle, 387 U.S. 541, 551 (1967).
150. In *See*, the Court maintained that business premises may be searched more often than homes because of the needs of the state to regulate business. *Id.* at 546.
151. Mancusi v. DeForte, 392 U.S. 364, 369 (1968).

the home is similarly invaded for an arrest. Notwithstanding the often cavalier treatment accorded warrantless home arrests, Justice Marshall's warning in *Watson* should be heeded: "No one acquires a vested or protected right in violation of the Consitution by long use even if the space of time covers our entire national existence."[152] The decision of the California Supreme Court in *Ramey* represents an enlightened approach to warrantless, non-emergency entries into the home: More jurisdictions should adopt this view.

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152. 44 U.S.L.W. at 4117 (Marshall, J., dissenting).